

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ADT SECURITY SERVICES

Employer

and

AN INDIVIDUAL

Petitioner

and

IBEW LOCALS 46 AND 76

Union

CASE 19-RD-206496

REQUEST FOR REVIEW

COMES NOW Employer ADT Security Services (“ADT” or “Employer”) and, pursuant to Section 102.69(c)(2) of the National Labor Relations Board’s Rules and Regulations, files this Request for Review of the Decision on Objection and Certification of Representative issued by the Regional Director for Region 19 (“the RD”) on February 14, 2018. The Board should grant this Request for Review because the Regional Director’s action: (1) departs from officially reported Board precedent; (2) is clearly erroneous on the record; and (3) presents compelling reasons for reconsideration of the Board’s Election Rules effective April 14, 2015.

I. STATEMENT OF THE CASE

ADT Security Services (“ADT” or “Employer”) installs and maintains residential and small business security systems nationwide, including at facilities in Tacoma and Bothell, Washington. On September 20, 2017, an individual Petitioner filed the petition in the above-captioned case, seeking to decertify IBEW Locals 46 and 76 as the representative of installers and technicians at those facilities. The RD directed on January 12, 2018, that an election take place on January 31, 2018, from 7:00 a.m. to 8:30 a.m., and from 3:00 p.m. to 5:00 p.m. at each facility. Following the election, the Tally of Ballots read, in pertinent part:

Number of Void ballots.....	<u>0</u>
Number of Votes cast for IBEW Locals 46 and 76.....	<u>49</u>
Number of Votes cast against participating labor organization(s).....	<u>37</u>
Number of Undetermined challenged ballots.....	<u>0.</u>

II. THE OBJECTION AND THE RD’S ERRONEOUS DENIAL OF A HEARING

On February 6, 2018, ADT timely filed an Objection and accompanying Offer of Proof to conduct affecting the results of the election. The Objection states:

OBJECTION #1: In violation of RCW 9.73.030(b), Union agents created an atmosphere of fear and reprisal by surreptitiously recording the Employer’s meetings without obtaining consent.

By the aforesaid conduct, the Union and its supporters destroyed the laboratory conditions pursuant to which a representation election must be held, and thereby seriously interfered with the employees’ freedom of choice.

The Offer of Proof further explains:

[A named employee] will testify that a Union representative informed him that the Union instructed its stewards to record the Employer’s meetings. [The employee] will also testify that he personally viewed and created a screenshot of a social media post by Union steward Patrick Cuff, which was viewed by other employees, and which stated that Cuff possessed recordings of meetings. At least

[a second named employee] will testify regarding how the recording destroyed laboratory conditions and created an atmosphere of fear.

On February 14, 2018, the RD issued a Decision on Objection and Certification of Representative (“Decision”). The Decision refuses to conduct a hearing, and instead administratively overrules the Employer’s Objection.

Pursuant to Section 102.67(d) of the Board’s Rules and Regulations, as incorporated by Section 102.69(c)(2), a party may request review of a Regional Director’s post-election Decision on Objections on one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the regional director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d).

In this case, the Board should grant Review because the Regional Director’s action, on its face, departs from officially reported Board precedent, and is clearly erroneous on the record in a manner prejudicially affecting the rights of the parties. Furthermore, the Regional Director’s action and this Request for Review involve changes to the Board’s Election Rules effective April 14, 2015, and compelling reasons exist for reconsideration of those Rules.

A. The Board's Standards and Guidance Require Only a Showing of Evidence Which Could Warrant Setting Aside the Election.

An objecting party's Offer of Proof need not present a voluminous narrative to warrant a hearing. Rather, the Board's Rules require only a "*short* statement of the reasons [for the Objections]." 49 CFR § 102.69(a) (emphasis added). As former Members Miscimarra and Johnson explained upon implementation of the current Representation Case Rules, an Offer of Proof "is an informal short-form description of potential evidence." 79 Fed. Reg. 74308, 74446 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson). Accordingly, the NLRB Casehandling Manual, Part 2, Representation Proceedings (January 2017) ("CHM") requires that Objections "contain a *short* statement of the reasons for the objections and be accompanied by a written offer of proof identifying each witness and *summarizing* the witness's testimony." CHM § 11392.2(a)(2) (emphasis added).

The CHM also guides Regional Directors decisions to set Objections for hearing, stating:

[The primary concern of a regional director is to afford due process to the parties ... the regional director should simply evaluate each objection and the accompanying offer of proof to determine whether the evidence described in the offer of proof *could* be grounds for setting aside the election[.]"

CHM § 11395.1 (emphasis added). *See also* CHM §§ 11391.1, 11392.6, 11393, 11394.1.

The Casehandling Manual further explains that the charging party need not describe every single detail of objectionable conduct in its Objections. CHM 11392.11 (noting, "The regional director is not required to, nor can he/[she] properly, ignore evidence relevant to the conduct of the election . . . simply because [a party] may not have specifically mentioned such conduct in its objections.") *quoting American Safety Equipment Corp.*, 234 NLRB 501 (1978).

Consequently, the Manual confirms that Offers of Proof should be "short." CHM § 11392.5. Its description of unacceptably nonspecific objections encompasses only truly vague statements such as, "by these and other actions, etc." *Id.* On the other hand, "if there are factual

contradictions raising substantial and material issues that could best be resolved by a hearing, the regional director should so proceed.” CHM § 11394.3.

These directives reflect Board standards. Over a quarter-century ago, the Board explained:

It is well settled that, where the objecting party submits prima facie evidence demonstrating that an election was not held under the proper laboratory conditions, the Board will not hesitate to commit the necessary investment of time and money to protect its election process.

The Holladay Corp., 266 NLRB 621, 621 (1983) citing *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82, 83-84 (1978).

An objecting party “may satisfy its burden in an Offer of Proof by specifically identifying witnesses [and] specifying which witnesses would address which objections.” *Transcare New York, Inc.*, 355 NLRB 326, 327 (2010). See also *Heartland of Martinsburg*, 313 NLRB 655, 655 (1994) (finding the Rules do not require that the objecting party’s evidence “include signed witness statements or affidavits”); *Holladay Corp.*, 266 NLRB 621, 622 (1983) (finding the fact that Employer “provided the names of two employee witnesses who . . . would substantiate the [] allegations” to be “critical[]”).¹ The Courts routinely approve this standard. See, e.g., *Trimm Associates, Inc. v. NLRB*, 351 F.3d 99, 106 (3d. Cir. 2003) (holding, “the question before the Board is not whether the objecting party can show that it will ultimately be able to prove its case, but only whether there has been a sufficient showing, given the inherent constraints on discovery, to raise a substantial and material issue of fact that, if resolved favorably to the objecting party, would warrant setting aside the election.”) (internal citation omitted).

¹ As the Outline of Law and Procedure in Representation Cases (June 2017) confirms, the 2015 changes to the Board’s Representation Case Rules did not alter the standard for specificity in Offers of Proof. §§ 22-117, 22-118 (pp. 304-05).

Consequently, Board standards do not require the Employer to conclusively assert every relevant fact potentially demonstrating objectionable conduct. Such a standard would essentially require a formal Complaint. Instead, the Employer need only identify witnesses and summarize anticipated testimony that *could* show objectionable conduct.

B. Surreptitious Recordings of Employees in Violation of State Law Provide a Basis Setting Aside an Election.

The Board has held that unconsented-to union recordings of employees constitute objectionable conduct sufficient to set aside an election. *Pepsi-Cola Bottling Co.*, 289 NLRB 736, 736-37 (1988) (setting aside election due to union’s apparent videotaping of at least two employees on employer’s premises); *Mike Yurosek & Son*, 292 NLRB 1074, 1074 (1989) (setting aside election due to union photographing employees, and noting union’s failure to give any explanation that would “assuage [employees’] fears that the pictures would be the basis for future reprisals”).

In *Pepsi* and *Mike Yurosek*, the Board found unconsented-to recordings objectionable if they lack a “legitimate explanation.” Later, in *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999) (*Randell I*), the Board overruled those cases and embraced an “all the circumstances” analysis, only to later return to the “appropriate” *Pepsi* and *Mike Yurosek* standard in *Randell Warehouse of Arizona*, 347 NLRB 591 (2006) (*Randell II*).

Surreptitious recordings of employees present particularly serious problems in Washington, where state law holds:

[I]t shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

...

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or

actuated without first obtaining the consent of all the persons engaged in the conversation.

WASH. REV. CODE ANN. § 9.73.030.

Consequently, Washington employees may generally rest assured that their daily activities are not under surveillance, unless they have granted consent to the recording. As the Board recently explained, such recordings risk “that employees’ personally identifiable information will be released” and “invasion of employee privacy.” *The Boeing Company*, 365 NLRB No. 154, slip op. at *18 (Dec. 14, 2017).

A union’s announcement to Washington employees that it possesses recordings of them, absent the type of legitimate explanation required by *Randell*, sends a clear message that the Union monitors and controls events, even in the face of state law. Such a message would satisfy the standard for objectionable conduct, even if a non-agent employee had performed and announced the recordings. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (describing the standard for objectionable third party conduct as “creat[ing] a general atmosphere of fear and reprisal”). Here, Union agents both performed and announced the recordings. Its conduct thus *a fortiori* satisfies the lower standard for party conduct: “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995).

C. The Regional Director’s Decision Misapplies and Deviates from Reported Board Precedent on Both the Showing Necessary for a Hearing and Surreptitious Recordings of Employees.

“If the regional director conducts an investigation of the objections, the investigation of objections is nonadversarial, insofar as the Agency is concerned.” CHM § 11392.10. The RD here treated the Employer’s Objection as unworthy of a Hearing simply because he could conceive of purportedly unobjectionable scenarios consistent with the Objection and Offer of Proof. That treatment exceeds the Employer’s responsibility to merely provide a “short” Offer

of Proof raising “substantial and material factual issues[.]” 49 CFR § 102.69(a); *Erie Coke & Chemical Co.*, 261 NLRB 25, 25 (1982). The RD’s erroneous standard also contravenes his responsibility to hold a hearing if the Objection and Offer of Proof describe evidence that *could* establish objectionable conduct. CHM §§ 11394.3, 11395.1.

The RD provides no support for his approach of requiring the Employer to account for every possible factual detail in its Objection and Offer of Proof. In fact, his authority directly contradicts the outcome he directed. **The Board held a hearing in every single case the RD cited in support of his Decision.** See *The Liberal Market, Inc.*, 108 NLRB 1481, 1481 (1954); *Delta Brands, Inc.*, 344 NLRB 252, 252 (2005); *Cambridge Tool & Mfg.*, 316 NLRB at 716; *Baja’s Place*, 268 NLRB 868, 868 (1984); *Pearson Education, Inc.*, 336 NLRB 979, 979 (2001); *Lake Mary Health and Rehabilitation*, 345 NLRB 544, 544 (2005); *Ideal Electric Mfg. Co.*, 134 NLRB 1275, 1275 (1961).

In addition to his erroneous procedural approach, the RD utilizes heavily flawed substantive analysis to overrule the Objection. For example, he rejects the Employer’s reliance on *Randell II*, stating, “Crucial to the Board’s decision in *Randell* is the premise that the photographing took place during the course of activity protected by Section 7.” Decision, *4.

Nothing in *Randell II* holds that employees must actually be engaged in protected activities while recorded in order for the recordings to be objectionable. To wit, the Union here recorded events during which protected activities may likely occur (group meetings). Even assuming no protected activities arose during the meetings, the Union still engaged in the unlawful and objectionable conduct. A day spent angling on the water is “fishing,” even if the fisherman leaves empty-handed.

The Union could also use its recordings against those employees who *failed* to object to the Employer’s message during meetings, which represents an activity equally as important in the current setting because employees were evaluating whether to exercise their rights to refrain from “form[ing] . . . or assist[ing] labor organizations” and whether “to bargain collectively through representatives of their own choosing” when they cast ballots in the RD petition. Such employees would have literally “refrained” from engaging in Section 7 activities, and the Union would possess recordings of their choices to refrain. Recording employees “captures a nonconsensual record of the *extent* of an employee’s participation in or receptiveness to certain Section 7 activity.” *Randell II*, 347 NLRB at 595 (emphasis added).

Even more importantly here, the RD cannot fully assess the events of these meetings *because he refused to conduct a hearing*. The Board cannot, consistent with due process, allow its RDs to state on one hand that certain facts would determine the outcome of an Objection, while on the other hand closing their ears to those facts. “The Board’s duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues.” 79 Fed. Reg. 74308, 74451 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson) *citing Bennett Industries, Inc.*, 313 NLRB 1363 (1994).

Additionally, the RD failed to address the Employer’s overriding argument. Even assuming *arguendo* that no protected activities occurred during the meetings – that the non-occurrence of such activities would render the recordings non-objectionable and that the RD could assume no such activities occurred without holding a hearing – the Union still disseminated its claimed possession of recordings on social media. No matter what happened during the meetings, and even if he lied about having recordings, Union steward Patrick Cuff

both interfered with employees' freedom of choice and created an atmosphere of fear and reprisal through this post.

His post sent employees the message, true or not, that the Union would be aware of what they said or did not say during group meetings. The dissemination of this message itself constitutes grounds for setting aside the election. *Pepsi-Cola*, 289 NLRB at 737 (relying on dissemination of videotaping to set election aside). The impact here is particularly significant because the outcome would be reversed if only six "Yes" voters had chosen to vote "No." *Id.* (finding narrow election results support re-run election in videotaping objection case).

Furthermore, the RD's Decision concludes with misapplications of two Board cases. He attacks the Employer's reference to the "atmosphere of fear" standard by citing *Lake Mary Health and Rehabilitation*, 345 NLRB 544, 545 (2005). According to the RD, *Lake Mary*, undermines the Objection because "employees' subjective reactions are irrelevant to the question of whether there was in fact objectionable conduct." Decision, *4.

Lake Mary addressed an employer's announcement of unilateral discontinuation of a popular economic benefit (due to internal miscommunication) two days before an election. The Board's statement regarding "subjective reactions of employees" addressed only the employer's contention that it did not intend to announce such a change. *Id.* *Lake Mary* did not disturb the Board's well-settled standards for "the tendency to interfere with employees' freedom of choice" or the "atmosphere of fear and reprisal," depending on whether a party or non-party committed objectionable conduct. Rather, the Board continues to evaluate factors such as dissemination and the voting margin to determine whether a "tendency to interfere" or an "atmosphere of fear and reprisal" warrant setting aside an election. *Flamingo Las Vegas Operating Co., LLC*, 360 NLRB 243, 246–47 n.15 (2014).

The RD also cites *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961), for the proposition that “affirmative evidence that the allegedly objectionable conduct occurred within the critical period is required.” Decision, *4, n.1. This citation highlights his attempt to require description of every possible detail, and to invent scenarios in which the Union’s conduct violated no Board standards. In fact, *Ideal Electric* did not address an Offer of Proof scenario, nor did it reject an Objection for lack of chronological specificity. Instead, *Ideal Electric* merely modified the Board’s standards for commencement of the critical period in a case where the parties established all relevant dates (pertaining to contract expiration and bargaining) *at a hearing*.

Here, the Employer properly objected to the Union’s recording of employees in group meetings, including dissemination of its possession of the recordings. Settled Board law demonstrates this conduct warrants setting aside the election. Consequently, the RD’s refusal to even conduct a hearing on the Objection violates both the Employer’s due process rights, and its employees’ statutory rights to a free and fair election. As a result, the Board should direct the RD to conduct a hearing on the Employer’s Objection.

III. THE DENIAL OF A HEARING AND THIS REQUEST FOR REVIEW RESULT FROM THE INVALID 2015 CHANGES TO REPRESENTATION CASE RULES.

The current Representation Case Rules, as implemented in 2015, impermissibly infringe upon the Employer’s free speech and due process rights, as well as its access to legal representation. The Rules also undermine employee free choice and privacy rights, thus violating the Employer’s and employees’ rights as guaranteed under the Act. Former Members Miscimarra and Johnson explained these issues more fully in their dissenting opinions to implementation of the current Rules. 79 FR at 74308, 74430-60. The Employer adopts and relies upon every argument described by Members Miscimarra and Johnson regarding the invalidity and inappropriateness of the current Rules.

Three specific aspects of the 2015 changes deprive the Employer and its employees of due process rights here. First, whereas the prior Rules allowed objecting parties to submit Offers of Proof within seven days of their Objections, § 102.69(a) now requires simultaneous filing. Meanwhile, the Regional Director here denied the Employer a hearing because he found the Offer of Proof to exclude certain factual details. As the Board has noted:

It is apparent that voluntary cooperation [from witnesses to objections] often will be difficult or impossible to obtain. Either an objecting employer or an objecting union might find considerable resistance among employees fearful of alienating their employer or union, in either event fearful of jeopardizing their jobs.

Holladay Corp., 266 NLRB at 622 quoting *Eds-Idab, Inc. v. NLRB*, 666 F.2d 971, 975 (5th Cir. 1982).

This context, and combined with RDs' apparent demands for precisely-described Objections, creates significant due process issues for the new version of § 102.69(a) of the Rules.

Second, § 102.69(c)(1)(i) now permits RDs to issue a Certification of Representative simultaneously with their Decision on Objections, even though the Board has not yet reviewed the outstanding election issues. The RD issued such a Certification here. In fact, the Regional Director issued a Certification of Representative before even ruling on the objections. Consequently, the election has received the Board's *imprimatur* of finality, even though the Board conducted no free and fair election under laboratory conditions. The Certification of Representative thus compounds the Union's objectionable conduct by sending a message to employees that the Union can violate state law, intimidate them with social media posts about recordings, and face no adverse consequences.

Third, § 102.69(c)(2) now provides that the Board will review all appeals of RDs' post-election Decisions on a discretionary, rather than mandatory, basis. As former Members Miscimarra and Johnson explained, this change undermines uniformity in representation cases

and encourages an increase in inefficient test of certification cases. 79 FR 74308, 74449-51. Perhaps most disconcertingly, elimination of mandatory review diminishes the role of the Presidentially-appointed and Senate-confirmed Board Members, contrary to Congress's statutory framework. This change deleteriously affects every representation case in which post-election proceedings occur, and every Request for Review, including the instant Request.

As a result, the Board should adopt standards applying the prior valid versions of the Rules, especially §§ 102.69(a), 102.69(c)(1)(i), and 102.69(c)(2).

IV. CONCLUSION

For the reasons set forth above, the Board should direct the Regional Director to conduct a Hearing on Objection in this case.

Respectfully submitted this 15th day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of March 2018, the foregoing, **REQUEST FOR REVIEW**, was filed via electronic filing with:

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